

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

March 30, 2021 at 1:30 p.m.

1. **18-27002-E-13** **JEFFREY/JESSICA BALUGO** **MOTION FOR RELIEF FROM**
APN-1 **Mary Ellen Terranella** **AUTOMATIC STAY**
TOYOTA MOTOR CREDIT **2-25-21 [40]**
CORPORATION VS.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 25, 2021. By the court's calculation, 33 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is XXXXXXX.

Toyota Motor Credit Corporation ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2015 Toyota Sienna, VIN ending in 6637 ("Vehicle"). The moving party has provided the Declaration of Hillary Coffelt to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Jeffrey Balajadia Balugo and Jessica Dinora Balugo ("Debtor").

Movant argues Debtor has not made two (2) post-petition payments, with a total of \$1,522.16 in post-petition payments past due. Declaration, Dckt. 43.

Additionally, after review of the account, Creditor asserts that Creditor has been unable to verify whether Debtor has insurance coverage on the Vehicle and thus Creditor believes that Debtor is operating the property without having any insurance coverage thereon. *Id.*

Movant has also provided a copy of the NADA Valuation Report for the Vehicle. The Report has been properly authenticated and is accepted as a market report or commercial publication generally relied on by the public or by persons in the automobile sale business. FED. R. EVID. 803(17).

TRUSTEE'S OPPOSITION

Trustee filed an Opposition on March 15, 2021 stating that Trustee has disbursed total payments in the amount of \$20,628.00. Dckt. 46. Moreover, Trustee requests the court take into consideration that although Debtor is in default \$1,1000, as of the date of Trustee's response, Trustee will disburse \$3,111.90 to Creditor as the March 2021 payment. Declaration, Dckt. 47.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on March 16, 2021. Dckt. 49. Debtor asserts having made a payment of \$3,000.00 to the Trustee on March 1, 2021. Trustee will disburse \$3,111.90 to Creditor for the March 2021 disbursements after which the remaining balance due to Creditor will be \$1,041.85. Additionally, Debtor contends that on March 2, 2021 Debtor's counsel forwarded proof of current insurance through Allstate of the Vehicle to Creditor's counsel.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$4,153.75 (Declaration, Dckt. 43), while the value of the Vehicle is determined to be \$20,875.00, as stated in Schedules A/B filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Here, a default has occurred, and Debtor and Trustee have presented evidence that it is being addressed, with it having been substantially cured. Because of the default, it was necessary for Movant to seek the relief and have the default addressed - whether through a cure or relief from the stay.

Movant's secured claim of (\$23,589.00) (Amended Order, Dckt. 30) is provided for in the confirmed Chapter 13 Plan. Pursuant to the terms of the Chapter 13 Plan, Movant's claim is amortized over 60 months with 3.54% interest.

Counsel for the Trustee testifies that as of his March 15, 2021 Declaration the Chapter 13 Trustee had disbursed \$20,628.00 to Movant, of which the Trustee computes \$19,435.25 went to principal and \$1,192.75 to interest. Dckt. 47. Then, for the March 2021 distribution there will be \$3,111.90 disbursed to Movant its secured claim, of which \$3,062.90 is for principal and \$49.00 to interest. With this disbursement, the principal amount of the secured claim will have been reduced by \$22,498.15, which leave a remaining claim balance of (\$1,090.85) (without taking into any additional costs, fees, or expenses).

Debtor also states in the Opposition that proof of insurance will be provided to Movant. No evidence of such insurance or that it has been provided is offered by Debtor, as no declaration was filed with the Debtor's opposition.

At the hearing, **XXXXXXX**

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Jeffrey Balajadia Balugo and Jessica Dinora Balugo ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that **XXXXXXX**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on March 15, 2021. By the court's calculation, 15 days' notice was provided. 14 days' notice is required.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

The Motion for Relief from the Automatic Stay is granted.

Virinder Grewel as to an undivided 20% interest and Scott R. Williams and Anastasie C. Martin Trustees of the Williams Trust Dated August 19, 2014 as to an undivided 19.20% interest and PENSCO Trust Company LLC Custodian FBO James B. Martin IRA as to an undivided 12.667% interest and PENSCO Trust Company LLC Custodian FBO Claire M. Martin IRA as to an undivided 8.667% interest and PENSCO Trust Company LLC Custodian FBO ANASTASIE MARTIN IRA as to an undivided 8.533% interest and Gurdev S. Grewal as to an undivided 7.333% interest and Michael J. Maderos and Catherine Maderos, Trustees of The Maderos Family Trust Dated 7/29/1999 as to an undivided 7% interest and Brian J. Tillinghast as to an undivided 7% interest and Equity Trust Company Custodian FBO Balwant K. Grewal IRA as to an undivided 6% interest and PENSCO Trust Company LLC Custodian FBO SCOTT R. WILLIAMS IRA, as to an undivided 3.60% interest, its successors and/or assignees ("Movant") seeks relief from the automatic stay with respect to an asset identified as a 2136 Twin Sisters Rd, Fairfield, California ("Property"). The moving party has provided the Declaration

of Rich Mendoza to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Elias Moreno (“Debtor”). Movant has provided the Declaration of Rich Mendoza to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor’s spouse Lucia Solorio has not made twelve (12) pre-petition payments in default, with a pre-petition arrearage of \$174,341.76. Declaration, Dckt. 12. Movant further testifies that on May 12, 2021, Creditor/Movant, via its foreclosure trustee, received a facsimile which included a grant deed (“Grant Deed”), where the borrower, Debtor’s spouse Lucia Solorio, allegedly transferred a 5% interest in the Property to the Debtor on March 8, 2021, three weeks after Creditor’s Motion for Relief was filed in Lucia Solorio’s second bankruptcy. The Grant Deed was recorded on March 8, 2021. *See* Exhibit 7, Dckt. 13.

Trustee does not oppose the relief requested and informs the court that Debtor has failed to file a Chapter 13 Plan, and Schedules A/B through J. Dckt. 21.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$1,691,947.59 (Declaration, Dckt. 12). Neither Debtor nor Movant provide a valuation of the Property.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments that have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)

(stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or the Chapter 13 Trustee, the court determines that there is no equity in the Property for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

11 U.S.C. § 362(d)(4): Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of Case Number: 2021-20042 Filed: 3/9/2021 Doc # 70 the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* In this case, Debtor's spouse has filed two consecutive cases, that according to Movant, have been filed for purposes of stalling the scheduled foreclosures. The court indeed found such bad faith as stated in the Civil Minutes for the Motion for Relief filed in Debtor's spouse's bankruptcy case, 21-20042, where Debtor's spouses filed two consecutive cases, that according to Movant, were filed for purposes of stalling the scheduled foreclosures. Civil Minutes, Dckt. 70.

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court concludes that the filing of the current Chapter 13 case in the Eastern District of California was part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor per se bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. The filing of the current Chapter 13 case has not been shown to have been for any bona fide, good faith reason in light of the previous state court action and Settlement Agreement, subsequent bankruptcy filings by both Debtor and his spouse, and other actions taken.

In this case, the filings of this Debtor and Debtor's spouse, Lucia Solorio, may be considered a series with the goal of hindering or delaying from taking the necessary steps to complete or commence its foreclosure. Debtor filed the instant case a day after the hearing on Movant's Motion for Relief in Debtor's spouse's bankruptcy case. At that hearing, Debtor showed knowledge over the history of the property, the delinquencies, and pending foreclosure. There is a previous history of litigation with Debtor's spouse of which Debtor is aware showing that Debtor's spouse knew the debt was owed, failed

to make payments, then settled the litigation through a Settlement Agreement but did not meet the due date that was negotiated, requested an extension that was given, and when that later due date came, Debtor's spouse chose to file bankruptcy two consecutive times.

The court has an extensive discussion of this secured claim and the relief from the automatic stay in the court's Civil Minutes for the March 9, 2021 hearing on the Motion for Relief From the Stay in the Lucia Solorio Chapter 13 case. 21-20042; Civil Minutes, Dckt. 70. Beginning on page 8 of the Civil Minutes the court discusses some of what transpired at the hearing on Movant's Motion for Relief From the Stay in the Lucia Solorio case. Debtor appeared at the hearing, serving as Lucia Solorio's translator. Debtor did not disclose that he was holding a deed purporting to have transferred a 5% interest from Lucia Solorio personally to Ms. Solorio and Debtor jointly.

In this case, Movant has provided the court with a copy of a document titled "Grant Deed" which states:

- A. Lucia Solorio having been the owner of the Twin Sisters Road Property as her sole and separate property as of the time of the "Grant Deed" being given;
- B. Lucia Solorio purports to "Grant(s) to Lucia Solorio a marry [sic] woman and Elias Moreno a marry [sic] man 5% of the equity of the property," which property is identified as the Twin Sisters Road Property.
- C. Further, "This is a Bonafida [sic] Gift and the Grantor received nothing in return R & T 11915."

Exhibit 7; Dckt. 13 at 39-40. The "Grant Deed" has the execution date of March 8, 2021, and is notarized on March 8, 2021 – the day before the March 9, 2021 hearing on the Motion for Relief by Movant in the Lucia Solorio bankruptcy case.

As is immediately apparent, Lucia Solorio could not legally transfer a 5% interest in property of the bankruptcy estate in her case to Debtor without court authorization or otherwise complying with 11 U.S.C. § 363.

At the hearing, Debtor advised the court that he is Ms. Solorio's husband. Though on Ms. Solorio's Schedule I she stated under penalty of perjury that her spouse had no income (21-20042; Dckt. 1 at 37-38). On the Statement of Financial Affairs (*Id.*, Dckt. 18 at 2) Ms. Solorio states that her spouse had no income in 2021, 2019, and 2018 (it may be that Ms. Solorio copied the information from her 2020 filing, 20-25199 in November 2020, and did not take into account the turning of the new year for her January 7, 2021 filing of case 21-20042). At the March 9, 2021 hearing in the Solorio case, Debtor advised the court that he is in the real estate business and anticipated having income in 2021.

On Schedule A/B Ms. Solorio states under penalty of perjury that the Property has a value of \$1,500,000. *Id.*; Dckt. 1 at 12. The Declaration in support of the current Motion for Relief in the Moreno case provides testimony that Movant computes the secured claim to be \$1,691,947.59. Declaration, p. 5:18-28, 6:1-4.5.

At the March 9, 2021 hearing in the Lucia Solorio case, the court discussed with Debtor and Ms. Solorio the need to employ counsel to effectively avail themselves of the relief available under the

Bankruptcy Code. Debtor advised the court that some counsel had been contacted, but Debtor and Ms. Solorio felt that the fee amounts they were being given were too much, so they were proceeding in *pro se*. Having failed twice in having Ms. Solorio attempting to seek relief, the court noted that if Debtor and Ms. Solorio sought to effectively try and save the Property, they needed the assistance of counsel. To afford Ms. Solorio and Debtor the opportunity to engage counsel, the court delayed the effective date for modification of the automatic stay to allow the nonjudicial foreclosure to proceed until April 1, 2021.

As noted by Trustee, in this case, Debtor has failed to propose a Chapter 13 Plan. Such failure may be further indication of using the bankruptcy protections to delay or hinder Movant's foreclosure proceedings.

The court finds that proper grounds exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). Movant has provided sufficient evidence concerning bankruptcy cases being filed to prevent actions against the Property. Movant has provided the court with evidence that Debtor has engaged in a scheme to hinder, defraud, and delay creditors through the multiple filing of bankruptcy cases.

In granting the 11 U.S.C. § 362(d)(4) relief, the court notes that such is not the end of the game for Debtor. While granting relief through this case, if Debtor has a good faith, bona fide reason to commence another case while that order is in effect for the Property, the judge in the subsequent case can impose the stay in that case. 11 U.S.C. § 362(c)(4). That would ensure that Debtor, to the extent that some bona fide reason existed, would effectively assert such rights rather than filing several bankruptcy cases that are then dismissed.

Relief From Co-Debtor Stay

The Motion requests relief from the co-debtor, Lucia Solorio, stay that arises under 11 U.S.C. § 1301. To the extent that Debtor acquired an interest in the Property from Lucia Solorio's "Grant Deed" executed during her current Chapter 13 case, and Lucia Solorio is then a "co-debtor" on the obligation of Ms. Solorio secured by the Property, cause has been shown for relief from the co-debtor stay.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees (other than to state Movant seeks the fees "pursuant to the Security Agreement"). No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Furthermore, a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

If Creditor desires to pursue such a Motion, then it may do so, with this court having jurisdiction to render an order thereon notwithstanding the dismissal of this case.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by: Virinder Grewal as to an undivided 20% interest and Scott R. Williams and Anastasie C. Martin Trustees of the Williams Trust Dated August 19, 2014 as to an undivided 19.20% interest and PENSCO Trust Company LLC Custodian FBO James B. Martin IRA as to an undivided 12.667% interest and PENSCO Trust Company LLC Custodian FBO Claire M. Martin IRA as to an undivided 8.667% interest and PENSCO Trust Company LLC Custodian FBO ANASTASIE MARTIN IRA as to an undivided 8.533% interest and Gurdev S. Grewal as to an undivided 7.333% interest and Michael J. Maderos and Catherine Maderos, Trustees of The Maderos Family Trust Dated 7/29/1999 as to an undivided 7% interest and Brian J. Tillinghast as to an undivided 7% interest and Equity Trust Company Custodian FBO Balwant K. Grewal IRA as to an undivided 6% interest and PENSCO Trust Company LLC Custodian FBO SCOTT R. WILLIAMS IRA, as to an undivided 3.60% interest, its successors and/or assignees ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 2136 Twin Sisters Rd, Fairfield, California ("Property") to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the request to terminate the co-debtor stay of Lucia Solorio of 11 U.S.C. § 1301(a) is granted to the same extent as provided in the forgoing paragraph granting relief from the automatic stay arising under 11 U.S.C. § 362(a).

No other or additional relief is granted.